

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MAD-CIV-ACT-CON-2021/00090

In the matter between:

LYDIA NASHIXWA

PLAINTIFF

and

HILENI NIINANE MOOLONGELA

DEFENDANT

Neutral Citation: *Nashixwa v Moolongela* (HC-MD-CIV-ACT-CON-2021/00090) [2023]
NAHCM 438 (27 July 2023).

Coram: MASUKU J

Heard: 30 February 2023; 2 and 30 March 2023

Delivered: 27 July 2023

Flynote: Action proceedings – Claim for payment of money arising out of promise to pay – Law of Evidence – proper approach to resolution of disputes of fact – Failure by defendant to file a witness’ statement as ordered by court – Prescription of claims and failure by defendant to raise prescription.

Summary: The plaintiff sued the defendant for payment of an amount of N\$100 000, together with interest and costs. The plaintiff claimed that she and the defendant entered into an agreement in terms of which they became partners in a business entity known as Moolongela Catering CC. The plaintiff further averred and testified that she invested an amount of N\$100 000 to the running of the business. After some time, she demanded payment of the money back and the defendant agreed to pay the money, which she did not.

This culminated in the plaintiff suing the defendant for the payment of the amount in question. The defendant's case was that the amount was for the running of an entity known as Ndilimeni Catering CC, which did not generate any profit and was closed down. As such, averred the defendant, the plaintiff was not entitled to the amount claimed.

Held: That where the respective version of parties, in a civil trial raise irreconcilable differences, the court must follow the approach set out in *Stellenbosch Farmers Winery Group Ltd v Martell et Cie and Others*.

Held that: Where a party to a civil action does not file a witness' statement, as ordered by the court, that party is not entitled to adduce evidence at the trial, short of applying for and being granted condonation by the court, with further directions as to the further conduct of the trial.

Held further that: The defendant had, on the evidence, promised to pay the amount claimed and that constituted a sufficient basis for the claim, quite apart from the fact that the business did not generate any profit.

Held: That the defendant did not raise the issue of prescription in this matter and that the court is not in law entitled to raise the matter of its own motion. In any event, the issue of prescription would not avail the defendant in the light of the interruption of prescription as a result of the defendant acknowledging her indebtedness to the plaintiff and her undertaking to pay the amount claimed.

Claim granted with interest and costs, as prayed.

ORDER

1. The plaintiff's claim succeeds.
 2. The defendant is ordered to pay to the plaintiff N\$100 000.
 3. Interest thereon at the rate of 20% *a tempore morae* from the date of judgment, to the date of payment.
 4. Costs of suit.
 5. The matter is removed from the roll and is regarded as finalised.
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JUDGMENT

MASUKU J:

Introduction

[1] The protagonists in this matter are two ladies, namely, Ms Lydia Nashixwa, the plaintiff and Ms Hileni Niinane Moolongela, the defendant. The bone of contention between the parties is an amount of N\$100 000 claimed by Ms Nashixwa from Ms Moolongela, which the former alleges she invested into a business partnership between her and Ms Moolongela but was not returned by the latter, notwithstanding promises to do so and lawful demand therefor.

[2] As a result, Ms Nashixwa, the plaintiff, sued the defendant for payment of the said amount, together with interest on the said amount and costs. The defendant, for her part denies that she is liable to the plaintiff in the amount claimed or at all.

[3] The task of the court, in this connection, is to consider the pleadings filed, the evidence led and to decide whether the plaintiff has proved her claim on a balance of probabilities.

Representation

[4] The plaintiff was represented by Ms Siyomunji, whereas the defendant appeared in person. I will, for purposes of the judgment, refer to the parties as the plaintiff and the defendant respectively.

The pleadings

[5] In terms of the particulars of claim, the plaintiff alleges that in December 2013, she and the defendant entered into an oral business partnership in terms of which it was agreed between the parties that she would invest a sum of N\$100 000 into an entity known as Moolongela Catering Services. In terms of that agreement, both parties were to share

equally in the profits of the partnership. Furthermore, the defendant was to be the managing partner of the business. It is common cause that the plaintiff did pay the amount in question, being her contribution to the defendant in two tranches of N\$50 000 on 11 December 2013 and 10 February 2014, respectively.

[6] The plaintiff avers that from February 2014, she was informed by the defendant that the business was yet to generate profit and that once that eventuated, the plaintiff's profit share would be paid to her. It is the plaintiff's case that from February 2014 to date, she has not received any profit from her stake in the business mentioned above. The plaintiff avers that on 22 August 2019, she advised the defendant that she no longer wanted to continue being in a business relationship with the defendant. The latter promised to repay her the sum invested by the plaintiff. Demand notwithstanding, further averred the plaintiff, the sum of N\$100 000 has not been paid to her by the defendant, hence the present claim.

[7] In her plea, the defendant, whilst admitting the oral agreement between the parties and the amount invested by the plaintiff, denied that the investment was into Moolongela Catering Services. She further averred that there were three partners including Ms Helena Shilongo, who set up a mini shop trading as Ndilimeke Trading CC, which was an entity registered by Ms Shikongo.

[8] The defendant pleads further that Ms Shilongo also invested N\$100 000 into the business, whilst the defendant invested N\$50 000, as she was the only partner who was unemployed and would be responsible for the day-to-day running of the business and would use her vehicle to conduct the demands of the business. The defendant averred that all the partners would be included in the running of the business, with Ms Shilongo carrying out the administrative functions of the business, including cashing up, stock-taking, capturing of stock and staff management.

[9] The defendant vehemently denied that she informed the plaintiff that she would be entitled to a profit share. She averred that like any other business endeavour, profits were not guaranteed in the business venture. It was her further averment that all the partners were aware that the business did not perform as expected and in fact sustained a loss and could not keep up with the monthly expenses. It is the defendant's case that the business' financial doldrums were well documented such that the partners, in 2015, in a bid to get the business operate in a sustainable manner, retrenched some members of staff and also decided to move the seat of the business to a less expensive site namely, Ombili in Katutura.

[10] The defendant avers that all the efforts to set the business on a profitable footing came to nought and as a result, the business was dissolved after a meeting in 2016 by the partners realising that there were no prospects of the business being turned around to be a profitable one. The defendant further denied that she promised to repay the plaintiff the amount of the plaintiff's investment as alleged.

[11] It must be mentioned that the plaintiff did not file her replication to the defendant's plea. As such, as appears from the narration of the averrals of the respective parties, the parties were far apart in terms of what could be regarded as common cause issues.

The pre-trial report

[12] In the pre-trial report, submitted by the parties, the court was called upon to determine the following disputed issues:

- (a) whether the plaintiff's investment was made into Moolongela Catering Services or Ndilimeke Trading CC;
- (b) whether the business comprised only of the parties;
- (c) whether the defendant did not play any role in the daily running of the business;
- (d) whether the investment was made on the promise that the defendant would be liable for any loss incurred by the business and would be liable to repay the plaintiff's investment;
- (e) whether the investment was paid to the defendant personally or to the trading account of Ndilimeke Trading CC;
- (f) whether the plaintiff cancelled the agreement and indicated she would refund the plaintiff;
- (g) whether the defendant admitted to owing the plaintiff the amount claimed in two meetings held in August and September 2019 and whether the plaintiff in fact received her share of profits from a tender awarded by the Ministry of Health and Social Services.

[13] Legal issues to be resolved included the question whether there was a breach of contract due to non-payment of profits from the business and whether there was a unilateral cancellation of the agreement and whether the plaintiff was entitled in law to compensation or restitution. There were very few issues not in dispute and these included the citation of the parties and the court's jurisdiction to hear and determine the matter.

The evidence led

The plaintiff

[14] The plaintiff's evidence was that in December 2013, she and the defendant entered into an oral business partnership in terms of which it was agreed between the parties that she would invest a sum of N\$100 000 into an entity known as Moolongela Catering Services. It was further agreed that the partners would share equally in the profits derived from the partnership. It was further agreed that the defendant would be the managing partner of the business.

[15] In line with the agreement, she further testified, she paid two amounts of N\$50 000 on 11 December 2013 and 10 February 2014, respectively. It is her evidence that notwithstanding the payment, she did not receive her share of profits from the business. On 22 August 2014, she further testified, she informed the defendant that she no longer wished to remain in the business partnership with her and the defendant undertook to refund her the amount she had invested as a contribution to the partnership.

[16] The plaintiff further testified that on 30 August 2019, a meeting was held by the parties together with Ms Helena Shilongo and one Ms Dina Iyaloo Mandumbwa, who was the secretary. The plaintiff testified that the defendant acknowledged in writing that she owed the plaintiff the amount claimed and further indicated that she, the defendant, needed to work out her expenditure and will thereafter provide feedback in the next meeting scheduled for 3 September 2019. It was her evidence that Ms Shilongo and the defendant refused to sign the minutes of the meeting.

[17] She further testified that on 3 September 2019, the persons identified in the earlier meeting attended. In addition, there was Ms Edwig Theodor. In that meeting, the defendant did not provide feedback regarding her expenditure as previously undertaken. She instead offered to pay the plaintiff the amount claimed in monthly instalments of N\$1 000, which the plaintiff rejected out of hand. It was her evidence that again, the defendant and Ms Shilongo refused to sign the minutes of this meeting. It was then that she decided to take the legal route to resolve the dispute.

[18] It was the plaintiff's evidence that she did not, at any time, invest money into Ndilimeke Trading CC and she further testified that she was never in partnership with Ms Shilongo, as alleged by the defendant. She testified that she was introduced to the latter by the defendant for the first time after she had paid the first instalment of the investment. She further denied any knowledge of the tender from the Ministry of Health and Social Services and further denied receiving the amount of N\$17 000 as alleged by the defendant in her plea.

[19] The plaintiff pointed out under cross-examination that in 2016, she indicated to the defendant that she no longer wanted to remain in the partnership. It was her evidence that the defendant accepted her decision and agreed to pay the money the plaintiff had invested back to her. Despite the promises, the defendant did not pay back the money, hence the claim against her. She further testified that she was never party to the running of the business, as she never took part in any of the essential activities involved in running a business, including the making of critical decisions appertaining to the business.

Ms Edwig Ndapwoudja

[20] The plaintiff also called Ms Edwig Ndapwoudja, an adult female who resides in Pioneerspark, Windhoek. She testified that she attended a meeting on Tuesday 3 September 2019 at about 13h00. The meeting, according to her evidence, had been convened to discuss the amount of N\$100 000 owed by the defendant to the plaintiff. She confirmed that Ms Shilongo and Ms Mandumbwa were also in attendance.

[21] It was her evidence that at this meeting, the minutes of the previous meeting, held on 30 August 2019, were read for adoption and correction, if necessary. There were, however, no corrections or amendments effected. The defendant and Ms Shilongo, however, refused to sign the minutes. It was her further evidence that the said minutes highlighted an acknowledgment made by the defendant that she proposed to the plaintiff to join her in the business as a partner. These minutes, further testified this witness, confirmed the defendant having requested the plaintiff to invest the amount of N\$100 000 into the business.

[22] The witness further testified that during this meeting, the defendant was afforded an opportunity to present her financial expenditure as she had requested the opportunity in the last meeting to work out her expenses and to provide feedback at the next meeting. It was this witness' evidence that the defendant did not, however, present any proof of expenditure and instead informed the meeting that she can pay back the amount claimed in monthly

instalments of N\$1 000. It was her evidence that the plaintiff rejected this proposal to repay the amount offered out of hand.

Dina Iyaloo Mandumbwa

[23] This witness testified that she resides in Katutura, Windhoek and was in attendance during the meetings that took place between the parties on 30 August 2019 and 3 September 2019, respectively. She testified that in the earlier meeting, the defendant requested the plaintiff to join her in the business undertaking as a partner and further requested the plaintiff to invest the amount claimed. She testified that the plaintiff agreed and thereafter paid the amount of N\$100 000.

[24] It was this witness' evidence that the defendant stated during the meeting of 30 August 2019 that her vehicle, a GMW double cab is left with three years to pay off and thus requested the plaintiff to wait until she had paid off the said vehicle after which she would refund the plaintiff the money claimed. Ms Mandumbwa further testified that the defendant made another suggestion in that meeting, namely, to be afforded an opportunity to work out her monthly expenditure and that she would give feedback at the next meeting to take place on 3 September 2019. This deferral was made with a view to afford the defendant an opportunity to consider how best to refund the plaintiff.

[25] The witness testified further that on 3 September 2019, the date to which the meeting had been postponed, the defendant did not tender her expenditure, as undertaken. Instead, she informed the meeting that she can refund the plaintiff in monthly instalments of N\$1 000, which offer was rejected by the plaintiff for the reason that it would take an inordinately long time to pay off the indebtedness. The plaintiff thereafter closed her case.

The defendant

[26] It is important to state that the defendant did not, despite having been ordered to do so by the court, file her witness' statement. As such, her version was not placed before court. The result of this is that whatever it is that she had put in cross-examination to the plaintiff and her witnesses, was not confirmed in part by her evidence. As such, her version was not tested by the plaintiff's legal practitioner in cross-examination as is customary. This would have considerably weakened the defendant's case. I will return to this later in the judgment.

[27] Notwithstanding her own lapses, the defendant did call three witnesses. These were Ms Shilongo, Ms Mushinga Wilhemina and Ms Teopolina Willem. I will briefly narrate the evidence each of them adduced during the hearing below, commencing with Ms Shilongo.

Ms Helena Shilongo

[28] This witness testified that in 2013, the plaintiff joined her and the defendant in entering into a tripartite agreement for operating a mini market with a take away component to it. It was her evidence that she did not know the plaintiff at the time. The defendant thereupon called a meeting to explain the business venture. It was her evidence that the defendant explained in that meeting the amount invested by the plaintiff and the witness, the stock, and equipment as well as the business opportunity, namely, the butchery.

[29] The witness testified that the plaintiff informed the defendant that she would think about the proposal. A few days later, she further testified, the plaintiff came with a cheque book to the shop and made out a cheque to the defendant in the amount of N\$50 000 and promised to pay the balance of even amount later. She honoured her promise.

[30] Ms Shilongo further testified that the defendant further informed the plaintiff that the partnership is using the name Ndilimeke Trading Company CC, which was 'owned' by the witness and was at that stage dormant. It was Ms Shilongo's further evidence that both she and the plaintiff contributed an amount of N\$100 000 each and further agreed that the defendant, as the one running the business, would have her running of the business reckoned as her contribution to the venture. That was the extent of her evidence.

Ms Mushinga Wilhemina

[31] This witness testified that she worked for Ndilimeke Trading CC from January 2014 to December 2014 at Gameente Location, Windhoek, where the business was located. It was her evidence that the owners of the business were the plaintiff, the defendant and Ms Shilongo. At the time, she further testified, the business had six employees.

[32] It was her evidence that in the course of time, the business reduced the daily income to less than N\$1000 per day. As the cashier, she testified, she saw the reduction first hand. In January 2015, she further testified, the business moved to a different location, namely Ombili, in Windhoek. This was because the business could no longer afford to pay the

employees. A retrenchment thus ensued, resulting in four employees being retrenched. The witness however survived the retrenchment.

[33] The witness testified further that in the following months, the financial situation of the business grew worse and the plaintiff used to do daily cash-ups, which were normally in the amount of N\$300. It was her evidence that the business only lasted for about four months in Ombili before closing its doors for business. She testified that a few months after the closure of the business, the defendant asked her to assist in her business called Moolongela Catering Services and Restaurant CC as a cashier. It was her evidence that this is a business that was in the defendant's sole ownership. She testified that she did other administrative work in this outfit until she was employed by the Namibia Defence Force in 2015.

Ms Tapoline Willem

[34] The last witness called by the defendant, was Ms Tapolene Willem. It was her evidence that the business Ndilimeke Trading CC was owned by the parties to this matter, together with Ms Shilongo. It was located at the Gemeente Location, Windhoek. The defendant, she further testified, was the cook, while the plaintiff and Ms Shilongo were involved in the administrative side of the business i.e. bookkeeping, stocktaking and daily cash-up.

[35] It was this witness' evidence that the business was slow and there was not much profit gained from running the venture and the rentals for the premises were high at the time. The witness testified that at some time, the three partners mentioned above, came together and resolved to downsize the business to a smaller one. They changed the premises to Ombilli. They also retrenched the staff from six to two. The health of the business did not, however, benefit from the changes effected, as it did not last even three months at the new location since it was not generating any income.

[36] The witness further testified that after the business was shut down, the partners came to an agreement to close the business since it had made a huge loss. Each party went her own way and the defendant then opened her own restaurant. The plaintiff opened a kindergarten, whereas Ms Shilongo opened a small hair salon. This was the extent of this witness' evidence. The defendant closed her case.

Assessment of the evidence and the probabilities

[37] It is worth mentioning that in a civil case, the standard of proof is not the same as in criminal cases, where a crime has to be proved beyond reasonable doubt. In civil cases, the plaintiff, on whom the onus ordinarily rests, has to prove his or her case on a preponderance of probabilities. The standard is thus less onerous than it is in criminal cases.

[38] It is now incumbent upon the court to decide, having regard to the evidence led, whether the plaintiff has, in this case managed to prove her case for the relief sought, on a balance of probabilities. To do this, the court is required to properly and carefully weigh the evidence adduced. In view of the notorious fact that the parties' respective cases are irreconcilable on important matters, it lies within the court's province to decide where the probabilities lie in this case.

[39] The approach that has been adopted in deciding the issue of probabilities has been outlined in the leading judgment of *Stellenbosch Farmers Winery Group Ltd v Martell Et Cie and Others*,¹ (SFW), where Nienaber JA propounded the applicable principles as follows:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by our courts in resolving disputes of this nature may be conveniently be summarised as follows: To come to a conclusion on the disputed issues, a Court must make findings on (a) the credibility of various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the Court's finding on the credibility of a particular witness will depend on the impression about the veracity of the witness. That, in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was placed or put on his behalf, or with established fact or with extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), the witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the Court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a Court's credibility findings compel it in one direction and its evaluation of the probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equiweighted probabilities prevail.'

¹ *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie and Others* 2003 (1) SA (SCA) p 14H-15E.

[40] I take comfort in the fact that the principles outlined for the resolution of disputes of fact, have been adopted and applied in many cases in this jurisdiction.² It is to the application of these principles that I now turn, in a quest to determine in whose favour the probabilities in this case lie. At the end of the day, I will have to decide whether the probabilities of the case, having regard to the principles set out above, indeed favour the plaintiff to enable the court to find in her favour or that she has failed to prove her case on a balance of probabilities. In the latter case, the only route open to the court would be to dismiss the plaintiff's claim.

Application of the SFW principles

[41] I should commence the assessment of this aspect of the case by stating the obvious. The defendant was not represented by a legal practitioner. As such, the conduct of the defendant's case was not presented as would otherwise have been. This often makes it difficult for the court as there is no equality of arms as it were. I did, however, to the extent necessary and appropriate, offer guidance to the defendant in the conduct of her case.

[42] In the instant case, as stated earlier in the judgment, the defendant did not file a witness' statement. As such, her version was not placed before court. Secondly, and naturally, the defendant was therefore not cross-examined because she did not give her testimony, as is the norm. This accordingly placed the defendant and her case on the back-foot. She placed no version and as such, her case as would be placed before court in evidence, could not be subjected to the scrutiny of cross-examination, in order to assist the court in weighing the probabilities of the case.

[43] This, thus fundamentally weakens the defendant's case. I should also mention that some of the witnesses the defendant called, especially Ms Wilhemina and Ms Willem, do not, in my considered view, serve to assist the defendant. I say so because they were not party to the agreement alleged by the plaintiff to have been made to enter into the partnership. Their evidence, as I heard and consider it, was largely geared to showing that the business did not perform according to expectations, which is what the defendant put to the plaintiff in cross-examination.

[44] That is however, besides the point when one has proper regard to the plaintiff's case. I say so for the reason that the plaintiff's case is that the defendant agreed to pay her the

² *Life Office of Namibia Ltd (Namlife) v Amakali and Another* (LCA 78/2013) [2014] NALCMD 17 (17 April 2014).

amount in question at a meeting, which the defendant's employees were not part of. In resolving this question, the only evidence that is relevant on the defendant's side, is that of Ms Shilongo. I will deal with it in due course.

[45] I must first start with the plaintiff's case. The plaintiff testified matter-of-factly and her evidence was not dislodged to any meaningful degree in cross-examination. She testified that she was invited to a meeting and decided to join in as partner with the plaintiff. Her evidence in this regard, is corroborated by the evidence of Ms Ndapwoudja, whose evidence is that she attended the meetings where the issue of the plaintiff's claim against the defendant was discussed.

[46] I cannot close my eyes to the fact that there appears to be a relationship between the plaintiff and Ms Ndapwoudja. This was not suggested in cross-examination to be a major factor in the credibility of her testimony. I however, take that into account at the back of my mind. In my view, although she is related to the plaintiff, she testified confidently and was not unhinged in cross-examination. Her evidence is that she attended meetings in which the plaintiff wanted the money she had invested to be returned to her and she produced minutes of the meetings that were held in this connection.

[47] The minutes were discovered by the plaintiff and the defendant did not find it appropriate to deal with them. They appear to be a contemporaneous recording of the events that took place between the parties. The evidence by Ms Ndapwoudja is that the defendant and her witness refused to sign the minutes of the meeting when requested to do so. The fact that they may have refused to sign the minutes does not detract from the fact that meetings were held, which they do not, in essence dispute. I have nothing on the basis of which I can disregard the contents of the minutes in relation to the payment of the amount claimed by the plaintiff against the defendant.

[48] It appears to me that the defendant nails her case primarily on the fact, which appears common cause, that the business did not do well, which is also recorded in the minutes. That does not, however, assist the defendant for the reason that the amount is claimed by the plaintiff based on a promise testified to by the plaintiff and her witness. It is also recorded in the minutes wherein the defendant undertook to repay it. The payment claimed did not necessarily hinge on whether the business venture was a success or not. It was based on a demand of the payment by the plaintiff and an undertaking by the defendant to pay, including in instalments of N\$1 000, which was rejected by the plaintiff out of hand as recorded earlier in the judgment.

[49] I should also mention that the plaintiff's version wherein she distances the involvement of Ms Shilongo, does not appear to be credible. I say so for the reason that the minutes of the meeting do appear to confirm the involvement of Ms Shilongo as an investor in the business.³ That fact does not, however, on its own, lead to the conclusion that the defendant did not make the promise to repay the plaintiff the amount in question, as testified to by both the plaintiff and her witness and also recorded independently in the minutes of the meeting. I must mention that even after becoming aware of the proceedings, Ms Shilongo did not apply to be joined to the proceedings so that she could participate in the proceedings as a party.

[50] An issue was made regarding the question whether the plaintiff invested in Moolongela or in Ndilimeke. The defendant's version, together with her witnesses was that the investment was made into the latter. It was Ms Shilongo's evidence that the latter was her company which was on the shelf, so to speak.

[51] There is no evidence placed before court by the defendant that the money was invested in Ndilimeke as alleged. In any event, what is clear from the bank statement discovered by the plaintiff is that the money was paid into the account of the plaintiff⁴ and the claim is against her and not either Moolongela or Ndilimeke. The issue of whether the investment was in Moolongela or Ndilimeke appears to me to be a red herring in the circumstances.

[52] I am of the considered view, in the circumstances, that the plaintiff has, by admissible evidence, made out a case for the relief sought. The defence mounted by the defendant does not, in my considered view, serve as a proper basis upon which to dismiss the plaintiff's claim.

Prescription

[53] Ms Siyomunji, for the plaintiff, in her written argument, dealt with the issue of prescription. Pertinently, this is not an issue that the defendant raised in her pleadings. It is also not an issue that the court is entitled to raise of its own motion in terms of the relevant law.⁵ I am of the considered view that the latter is an issue that should be revisited by the

³ Page 16 of the Minutes of Meeting dated 30 August 2019.

⁴ Pages 10 and 12 of the Plaintiff's discovered documents.

⁵ Section 14 of the Prescription Act 68 of 1969.

legislature, as it yields injustice, as in this case, where the defendant is not represented by a legal practitioner and the court cannot intervene and direct the parties to deal with it.

[54] Ms Siyomunji submitted that for the reasons stated above, the court should not entertain the issue at all. In the alternative, it was her submission that the prescription, if applicable, was in any event interrupted by the defendant's acknowledgement that she owed the plaintiff in 2016. Her submissions in this regard are not gainsaid and I accept them as correct.

Conclusion

[55] There is no dispute between the parties that there was a partnership in this matter. It is accordingly not necessary that I deal with the law applicable to partnerships in the instant case. In the premises, I am of the considered view that the plaintiff has made out a case for the payment of the amount claimed on a balance of probabilities. There is no basis upon which the court can properly withhold judgment in the plaintiff's favour, having regard to what is stated above.

Costs

[56] The law applicable to costs has, like the majestic Baobab tree, taken root in the jurisprudential soils of this country. The general rule is that costs follow the event, although the court, at the end of the day, has a discretion in the award of costs, depending on the special circumstances that may exist in any particular case. In that event, the court may depart from the general rule.

[57] In the instant case, it does not appear to me that there is any proper basis upon which the court can deviate from applying the general rule. There is also no argument advanced by the defendant that even remotely suggests that this is a case in which the general rule ought to be departed from, proper regard had to the result above. The general rule will accordingly apply.

Order

[58] Having regard to all the foregoing considerations and conclusions, it appears that the following order is, in my judgment condign in the instant case:

1. The plaintiff's claim succeeds.
2. The defendant is ordered to pay to the plaintiff N\$100 000.
3. Interest thereon at the rate of 20% *a tempore morae* from the date of judgment, to the date of payment.
4. Costs of suit.
5. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

PLAINTIFF: M Siyomunji
Of Siyomunji Law Chambers, Windhoek

DEFENDANT: H Moolongela
The defendant in person